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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 412

VIRGINIA STATE BOARD OF ELECTIONS, ET AL., *Appellants*,

v.

E. LESLIE HAMM, ET AL., *Appellees*.

On Appeal From the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the part of the final order of the District Court appealed from herein be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia is reported in 230 F. Supp. 156 and appears as Appendix A to appellant's Statement of Jurisdiction. The final order of the Court appears as Appendix B to the Statement of Jurisdiction.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Statement of Jurisdiction.

QUESTION PRESENTED

Whether Virginia laws which require the maintenance on a racially segregated basis of public records pertaining to registration and voting, and property ownership and taxation, violate the Fourteenth and Fifteenth amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Virginia Constitution and statutes are adequately summarized in the Statement of Jurisdiction, pp. 3-4, and are set forth verbatim in Appendix C thereto.

STATEMENT

This is a companion case to *Tancil, et al.* v. *Woolls, et al.*, No. 386, this Term. Both appeals arise out of a single proceeding brought in the District Court for the purpose of challenging the constitutionality of various racially discriminatory provisions of the Virginia Constitution and statutes. In the instant case, appellants seek reversal of the ruling of the three-judge District Court (constituted pursuant to Title 28, U.S.C. Sec. 2284) declaring unconstitutional and enjoining enforcement of provisions of Virginia law which require the maintenance on a racially segregated basis of public records concerning registration and

voting, and property ownership and taxation. *Tancil, et al.* v. *Woolls, et al.* consists of an appeal from the District Court order upholding as constitutional a provision of Virginia law requiring every decree of divorce entered by court in the State to "contain a recital showing the race of the husband and wife." Section 20-201, Code of Virginia (1950).

The appellees in the case at bar are colored and white persons who are citizens of the United States, and one or more of whom reside either in Arlington or Fairfax County or the City of Alexandria, Virginia. They are owners of real and personal property and qualified voters and taxpayers. They brought this action against the governmental boards and officers on the state level, and their counterparts in the local jurisdictions where the appellees reside, who have responsibility under Virginia law for the enforcement, execution and administration of the racially discriminatory laws in question.

The provisions of Virginia's registration and voting laws challenged by appellees are those requiring that records of qualified voters and persons who have paid their poll taxes be kept separately by race, i.e., according to whether the person named is "white" or "colored," or, in specified instances, a "tribal Indian." By virtue of these laws, white persons, colored persons, and Indians who present themselves at the polls to vote in Virginia must be identified by the election clerks and judges from separate listings according to the race or color of the voter. The Virginia State Board of Elections, an appellant herein, supervises and coordinates the work of county and city election officials throughout the State, and by means of published rules and policies obtains uniformity in electoral practices and compliance with the State's registration and voting laws. Included among the appellants are the electoral boards and general registrars of Fairfax and Arlington counties and the City of Alexandria, as well as the Director of Finance

for Fairfax County and the treasurers of Arlington and Alexandria. These appellants are engaged at the local level in the enforcement and administration of the provisions of the registration and election laws in question.

Appellees, in the District Court, also attacked racial provisions of Virginia's property and tax laws. Section 58-790 of the Code of Virginia (1950), requires official assessors throughout the State, at the time of making assessments of real estate, in addition to acertaining the fair market value of all assessable property, to note whether the owner is white, colored or Indian. The racial information thus obtained is recorded in the official land books of the county or city in which the property is located. The land books, in addition to containing separate listings of property according to the race of the owner, are used for recording on a racially segregated basis the assessed valuation of real estate as well as tax levies and payments. The official form for land books (except those used in certain cities) is prescribed according to statute by the appellant, C. H. Morrissett, Virginia State Tax Commissioner. Apepllant Morrissett, as part of his duties, also prescribes the form of personal property books used by counties and cities throughout Virginia, and in which are recorded personal property assessments with taxes and levies. These records are also required by the statutory provisions here challenged to be kept on a racially segregated basis. The appellants in this proceeding also include the officials of Arlington and Fairfax counties and the City of Alexandria who perform the duties of Commissioner of Revenue for each of these jurisdictions; these officials, as part of their official duties, keep and maintain on a racial basis various of the property and tax records affected by the statutory provisions in question.

The District Court held that the six challenged provisions of the Virginia code and one provision of the State's constitution conflict with the Fourteenth Amendment to the

Constitution.[1] The Court therefore enjoined the appellant State and local officers from administering and enforcing these provisions on and after December 31, 1964.

ARGUMENT

The decision of the court below is plainly correct. As the court noted in its opinion, since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, "[s]ubsequent decisional law has made it axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on the basis of their color" (Appellants' App. 2). This Court has also emphasized that "racial classifications are obviously irrelevant and invidious" (*Goss* v. *Board of Education*, 373 U.S. 683, 687), and "must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe*, 347 U.S. 497, 499. Accord, *Anderson* v. *Martin*, 375 U.S. 399, 403-404.

Appellants have failed to justify the provisions of Virginia law in question, which by their terms require the maintenance, separately by race, of various public records pertaining to registration and voting, as well as property ownership and taxation. There can be no doubt that these laws reflect the policy of government-enforced segregation of the races which has long prevailed in Virginia and other southern states. Since the *Brown* decision, however, it is manifest that such racial laws may not stand under the Constitution. Judicial authority has invalidated laws requiring racial segregation in public activities of all kinds, including public education, transportation, public parks and playgrounds, court rooms, as well as business establishments, serving the public. Since the instant laws are part of the

[1] The appellees, in the District Court, also alleged that the Fifteenth amendment was violated by the provisions of the Virginia registration and voting laws requiring the maintenance of racially segregated voter eligibility lists.

same outmoded fabric of state-imposed segregation of the races they suffer the same constitutional infirmity.

The unlawful character and purpose of the Virginia laws in question is underscored by the unnatural emphasis which they place on race.[2] Virginia, by maintaining separate lists, according to race, of those qualified to vote, in effect, requires every voter who presents himself at the polls to submit to a determination of his race by election officials before it can be determined if his name is listed among those entitled to cast a ballot.[3] Similarly, under the laws in question access to public records pertaining to property ownership and taxation depends initially on ascertainment of the race of the individual whose records are sought—for only after his race is determined is it possible to find the individual's name and to locate the desired information.

Appellants contend that these statutes aid in gathering statistical data which is useful for economic and sociological purposes and in the study of vital statistics. Concededly, the collection of statistics concerning its citizens is a legitimate function of the State. However, appellants have at no time in this proceeding shown that the instant laws were enacted with a statistical purpose in view. Further, even if the contested provisions facilitate the State's collection of statistical information, this is not enough to establish their constitutionality. Obviously, improved statistical information concerning race is a foreseeable by-product of every system of segregation, but this does not satisfy the constitutional test. For when the State under-

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[2] As the Court stated in *Anderson* v. *Martin*, *supra*, 375 U.S. at 404, "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid."

[3] The maintenance of voter lists on a racial basis was condemned in *United States* v. *Raines*, 189 F. Supp. 121, 133 (M.D. Ga.); *Anderson* v. *Courson*, 203 F. Supp. 806, 810 (M.D. Ga.); *United States* v. *Bibb County Democratic Executive Committee*, 223 F. Supp. 493, 498-499 (M.D. Ga.).

takes the collection of statistical data about its citizens, the means employed must be reasonably adapted to the end sought, i.e., the means may not transgress constitutional rights.[4]

As the court below properly recognized, a State policy or statute offends the Constitution when it draws a distinction between persons solely on the basis of race or color. And the "governmental action need not effectuate segregation of facilities directly" (Appellants' App. 2-3). The instant statutes, because of their unjustified emphasis on racial differences, by their nature recommend themselves to those in our society who would perpetuate racially discriminatory practices. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power * * * that private action takes hold." *NAACP* v. *Alabama*, 357 U.S. 449, 463. This Court has made clear that the exercise of State power which encourages private discrimination falls just as plainly under the constitutional proscription as do more direct means of effecting discrimination through State action. *Peterson* v. *City of Greenville*, 373 U.S. 244, 247-248; *Anderson* v. *Martin*, *supra*, 375 U.S. at 402-404.

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[4] Recognition of traditional constitutional values and protection of an individual's right to privacy is implicit in the procedures followed by the United States Bureau of the Census. The Bureau is prohibited by statute from making public data where "any particular individual * * * can be identified." 13 U.S.C. Sec. 9(a)(2), as amended October 15, 1962, Pub. L. 87-813, 76 Stat. 922.

Racial discrimination in voter participation was recently treated by Congress in the Civil Rights Act of 1964. Pub. L. 88-352 (1964). Under Title VIII of the Act, the Bureau of the Census is directed to compile registration and voting statistics on the basis of race, color and national origin in certain geographic areas, in order to determine the extent to which the right of franchise is exercised. A specific clause was written into this title to prevent the public disclosure of data where any individual can be identified by race, and, further, to permit a person to refuse to supply the Bureau information concerning his race if he so desires. 110 Cong. Rec. 12384(3), 15364(3), 15458.

CONCLUSION

For the foregoing reasons, the appellees submit that the District Court was correct in concluding that the laws in question are unconstitutional, that the appellants present no substantial question for the decision of this Court, and that the order of the District Court should be affirmed.

Respectfully submitted,

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